DATUK BANDAR KUALA LUMPUR v. SRI TINGGI SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[ORIGINATING SUMMONS NOS: WA-24C(ARB)-30-05-2024
& WA-24C(ARB)-16-03-2024]
16 DECEMBER 2024

Abstract– *An arbitrator in Malaysia is bound by the doctrine of stare decisis and must, therefore, consider the Malaysian common law, as developed through Malaysian court decisions, in arriving at his arbitral award.*

ARBITRATION: *Award – Decision of arbitrator – Arbitration proceedings – Arbitrator's decision disregarded established Malaysian case laws – Whether doctrine of stare decisis applies to arbitration – Whether there was fundamental error in arbitrator's decision – Whether arbitrator acted outside jurisdiction*

ARBITRATION: *Award – Decision of arbitrator – Arbitration proceedings – Arbitrator's failure to consider Malaysian public policy – Whether constituted breach of natural justice*

The plaintiff, the employer of a project, had appointed the defendant as a contractor to undertake the construction of a multi-level interchange ('works') for a contract sum of RM165,303,202.15. The parties entered into and executed the DBKL Form 203A (Rev. 1/2010) together with the special provision to the conditions of contract ('COC'). The COC contained an arbitration clause. A dispute between the parties culminated in arbitration proceedings. During the arbitration proceedings, the plaintiff claimed that cl. 44 of the COC should be read in isolation. The arbitrator, however, decided that cl. 44 must be read together with cl. 43 despite the contention by DBKL that they had referred to various case laws on this point which showed that the failure to comply with cl. 44 was fatal and, as such, the defendant was not entitled to its claim for loss and expenses. The arbitrator dismissed the Malaysian case laws on the interpretation of such clauses as he held that they were not binding on the arbitration proceedings due to, as stated in his decision, that 'The legal principle of *stare decisis* is only applicable to court proceedings and not arbitration. There is no similar principle of *stare decisis* in arbitration due to private and confidential nature of its proceedings' and 'Most of the case laws that were produced in this arbitration by both parties are cases initiated in the courts of law and not in arbitration. Therefore it is not strictly applicable in arbitration'. Further, the arbitrator found that the COC was only a contractual clause and unconnected to any public policy requirement by DBKL. At the conclusion of the

proceedings, the arbitrator handed out an award in favour of the defendant. Hence, the present applications: (i) by the plaintiff to set aside the award; and (ii) the defendant to enforce the award.

Held (granting order in terms in plaintiff's application; dismissing defendant's application with costs):

(1) The arbitrator's decision not to be bound by the doctrine of *stare decisis* went wholly against the law of the land and he had committed a denial of natural justice, in conflict with Malaysian public policy, as he had wrongly disregarded and dismissed the doctrine of *stare decisis* when he found himself not to be bound by the case laws mentioned and submitted by DBKL merely because the arbitrator believed that arbitration proceedings were not bound by the doctrine of *stare decisis*. As a result of the same, the arbitrator had gone on a frolic of his own when not applying Malaysian case law and only referring to Malaysian statutes and, as such, the award went against 'public policy'. In the context of the law here in Malaysia, the 'law' as it stands is defined under art. 160 of the Federal Constitution as '… includes written law, the common law …'. Common law in Malaysia would include such Malaysian common law developed through cases decided by our courts. (paras 16 & 20-22)

(2) There was a serious and fundamental error in the arbitrator's decision on the issue of 'public policy' as it went against his duties and obligations under the Arbitration Act 2005 which provides that the arbitrator must have regard to the public policy of Malaysia. The arbitrator must consider the issue of public policy in making the award and not simply brush aside the same based on the misconception and flawed idea of what 'public policy' is. There was no justification for the arbitrator's reasoning on this issue as it was erroneous in law. The arbitrator had breached the rules of natural justice in arriving at his award on this point. (paras 29 & 30)

(3) The arbitrator had deprived the parties the right to be heard on the aforesaid points when he should have done so to allow the parties the opportunity to submit and deal with his understanding of the law and the interpretation that he had afforded to the said issues. The issues which had been found by the arbitrator had also caused the proceedings in the tribunal to go beyond the terms of the arbitration itself which was often also stated to have been decided on a 'new difference'. The ground of setting aside the award of excess of jurisdiction had been proven as the issue of the non-application of the doctrine of *stare decisis* was never a dispute which was referred to the arbitrator. (paras 32, 36 & 37)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***

Ipoh Tower Sdn Bhd v. Taki Engineering Sdn Bhd & Another Case [2016] CLJU 874; [2016] 1 LNS 874 HC ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] SGCA 28 ***(refd)***

Superintendent Of Lands And Surveys, Kota Samarahan Division & Anor v. Luking Uding & Ors; Th Pelita Sadong Sdn Bhd & Anor (Interveners) And Other Appeals [2016] 5 CLJ 378 CA ***(refd)***

Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2017] 9 CLJ 273 FC ***(refd)***

UDA Land Sdn Bhd v. Puncak Sepakat Sdn Bhd [2020] CLJU 877; [2020] 1 LNS 877 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 20, 37(1)(a)(iii), (iv), (v), (b)(ii), (2)(b), 38, 39

Federal Constitution, art. 160

(Originating Summons No: WA-24C(ARB)-30-05-2024)

For the plaintiff - Rishwant Singh, Mohd Irwan Ismail & Karamjit Singh; M/s Bhadarul Baharain & Partners

For the defendant - Richard Kok Chi Wei; M/s Richard Kok

(Originating Summons No: WA-24C(ARB)-16-03-2024)

For the plaintiff - Richard Kok Chi Wei; M/s Richard Kok

For the defendant - Rishwant Singh, Mohd Irwan Ismail & Karamjit Singh; M/s Bhadarul Baharain & Partners

Reported by Najib Tamby

JUDMENT
(Encl. 1)

Nadzarin Wok Nordin J:

[1] In Originating Summons No: WA-24C(ARB)-30-05-2024 (OS 30), Datuk Bandar Kuala Lumpur ("DBKL") has applied to this court to set aside the arbitration award dated 6 February 2024 ("award") made in favour of Sri Tinggi Sdn Bhd ("STSB") pursuant to s. 37(1)(a)(iii), (iv) and (v) of the Arbitration Act 2005.

[2] In Originating Summons No: WA-24C(ARB)-16-03-2024 (OS 16), STSB has applied to enforce the award in accordance with s. 38 of the Arbitration Act 2005.

Brief Background Facts

[3] DBKL was the employer of the project known as "Cadangan Membina Persimpangan Bertingkat Di Persimpangan Jalan Ampang/Jalan Jelatek at Kuala Lumpur" ("project").

[4] By way of a letter of acceptance dated 21 July 2014 ("LOA"), DBKL appointed STSB as a contractor to undertake the construction of a multi-level interchange at Jalan Ampang/Jalan Jelatek ("works") for a contract sum of RM165,303,202.15.

[5] Pursuant to the LOA, the parties entered into and executed the DBKL Form 203A (Rev. 1/2010) together with the special provision to the condition of contract.

[6] The agreement between the parties consists of the following documents as contained in the contract documents:

(i) instruction letter to commence work;

(ii) insurance policy;

(iii) LOA;

(iv) Part 1 – Instructions to tenderers;

(v) Part 2 – Conditions of making a tender;

(vi) Part 3 – Form of tender;

(vii) Part 4 – Conditions of Contract based on DBKL Form 203A (Rev. 1/2010) together special provision to the conditions of contract;

(viii) Part 5 – Preamble to bill of quantities;

(ix) Part 6 – Tender summary;

(x) Part 7 – Preliminaries;

(xi) Part 8 – List of quantities;

(xii) Part 9 – Specification; and

(xiii) Part – Annexures.

(Hereinafter collectively referred to as the 'contract').

[7] The conditions of contract contain an arbitration clause which reads as follows:

66.0 ARBITRATION

66.1 If any dispute or difference shall arise between Datuk Bandar and the Contractor out of or in connection with the contract, the parties shall refer such matter. dispute or difference to the officer named in Appendix for a decision.

66.2 The officer named in Appendix's decision shall be in writing and shall subject to clause 66.4 hereof, be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

66.3 If he parties -

(a) fails to receive a decision from the officer named in the Appendix within forty-five (45) days after being requested to do so; or

(b) *is dissatisfied with any decision of the officer named in the Appendix, then such dispute or difference shall be referred to arbitration within forty-five (45) days to an arbitrator to be agreed between the Parties and failing such agreement, to be appointed by the Director of the Regional Centre for arbitration in Kuala Lumpur on the application of either Party hereto. Such arbitration shall be heard at the Kuala Lumpur Regional Centre for Arbitration and shall be conducted in accordance with the rules for arbitration of the Kuala Lumpur Regional Centre for Arbitration using the facilities and the system available at the Centre.*

66.4 Such reference, except on any difference or dispute under clause 51 hereof shall not be commenced until after the completion or alleged completion of the works or determination or alleged determination of the Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of Datuk Bandar and the Contractor.

66.5 In the event that such consent has been obtained in accordance with clause 66.4, the reference of any matter, dispute or difference to arbitration pursuant to this clause and/or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Contract.

66.6 In any arbitration proceedings conducted pursuant to clause 66.3 the parties may make any counter claim in relation to any dispute or difference arising from the Contract.

66.7 Upon every or any such reference the costs of such incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof or direct the amount to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same be borne, award and paid.

66.8 The award of the Arbitrator shall be final and binding on the parties.

66.9 In the event of the death of the arbitrator or his unwillingness or inability to act, then Datuk Bandar and the Contractor upon agreement shall appoint another person to act as the arbitrator, and in the event Datuk Bandar and the Contractor fail to agree on the appointment of an arbitrator, and arbitrator shall be appointed by the Director of the Regional Center for Arbitration in Kuala Lumpur.

66.10 In this clause, "reference" shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 2005.

66.11 The arbitration shall be governed by the Arbitration Act 2005 *and the laws of Malaysia.* (emphasis added)

[8] A dispute arose between the DBKL and STSB out of or in connection with the contract.

Analysis And Findings

[9] After due consideration of the submissions of the respective parties and the issues raised, I find that in essence, the main argument relied on by DBKL in respect of OS 30 is the fact that the arbitrator had flagrantly disregarded the established Malaysian law and the doctrine of *stare decisis* and substituted his own legal theories which were never put to the parties for their consideration.

[10] In perusing the award, this court had noted that the arbitrator had stated in para. 71 of the award as follows:

(a) Tribunal states that it is only duty bound in this Arbitration to adhere to the Arbitration Act 2005 and the AIAC Arbitration Rules 2021

(b) The legal principle of *stare decisis* is only applicable to Court proceedings and not Arbitration. There is no similar principle of *stare decisis* in Arbitration due to the private and confidential nature of its proceedings.

(c) the Tribunal is beholden to the Malaysian Law under which this Arbitration is conducted as it is the law of the seat.

(d) Most of the case laws that were produced in this Arbitration by both parties are cases initiated in the Courts of Law and not in Arbitration. Therefore, it is not strictly applicable in Arbitration.

[11] Having set out the portion of the award which relates to the arbitrator's decision on the Malaysian law and the applicability of and effect of Malaysian case law on the said arbitration proceedings, I now turn to what is contained in the arbitration agreement.

[12] I have since viewed the said arbitration agreement, which can be found in cl. 66.0 of the conditions of contract at encl. 1 of OS 30 and which I will refer to the salient portions therein, which contain the express provisions of:

66.1 If any dispute or difference shall arise between Datuk Bandar and the Contractor out of or in connection with the contract, the parties shall refer such matter, dispute or difference to the officer named in the Appendix for a decision

…

66.3 If the parties

(a) …

(b) Is dissatisfied with any decision of the officer … then such dispute or difference shall be referred to arbitration … Such arbitration shall be heard at the Kuala Lumpur Regional Centre for Arbitration and shall be conducted in accordance with the rules for arbitration of the Kuala Lumpur Regional Centre for Arbitration …

…

66.11 The arbitration shall be governed by the Arbitration Act 2005 and the laws of Malaysia.

[13] In the matter before me, cl. 44 of the conditions of contract had stated as follows:

44.0 Claims For Loss And Expense

44.1 If at any time during the regular progress of the Works or any part thereof has been materially affected by reason of delays as sated under clause 43.1(c), (d), (e), (f) and (h), and the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within thirty (30) days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to clause 44.2 hereof.

44.2 As soon as it practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of all claims for direct loss or expense under clause 44.1 together with all supporting documents, vouchers, explanations and calculations which may be necessary to enable the direct loss or expense to be ascertained by the S.O. The amount of such direct loss or expense ascertained by the S.O. shall be added to the Contract Sum.

44.3 If the Contractor fails to comply with clauses 44.1 and 44.2, he shall not be entitled to such claim and Datuk Bandar shall be discharged from all liability in connection with the claim.

[14] In the arbitration proceedings, DBKL claimed that the said cl. 44 of the conditions of contract should be read in isolation but the arbitrator had decided that the said cl. 44 must be read together with cl. 43 despite the contention by learned counsel for DBKL that they had referred to various case laws on this point which showed that the failure to comply with cl. 44 was fatal and as such, STSB were not entitled to its claim for loss and expenses. The cases included:

In respect of the construction of clause 44 of the Conditions of Contract, DBKL referred the learned arbitrator to, *inter alia*, the following case law and authorities to support its contention that the failure comply with clause 44.1 was fatal, and as such, Sri Tinggi was entitled ti is claim as provided under clause 44.3 –

A (a) *Sunissa Sdn Bhd v. Kerajaan Malaysia & Anor* [2020] MLJU 283;

(b) *Jabatan Kerja Raya Malaysia v. Sunissa Sdn Bhd* [2022] 8 CLJ 901;

(c) *Budaya Restu Sdn Bhd v. Kerajaan Malaysia* [2022] MLJU 939;

(d) *KL Eco City Sdn Bhd v. Tuck Sin Engineering & Construction Sdn Bhd*
B *& Anor* [2020] MLJU 2457;

(e) *Bhaskaran a/l Thiruppvanam v. Ong Chong Realty Sdn Bhd & Anor* [2017] MLJU 644;

(f) *IC&E Group Snd Bhd v. Jabatan Kerja Raya Malaysia & Anor* [2021] MLJU 2801;

C

(g) *Perbadanan Pembangunan Pulau Pinang v. Trikkon Construction Sdn Bhd* [2012] 2 MLJ 98; and

(h) *Menteri Besar Kelantan v. Syarikat Perusaan Majubina Sdn Bhd* [2016] 4 MLJ 570

D **[15]** In applying his mind to the decision on this point, it is clear in my view that the arbitrator had dismissed the Malaysian case law on the interpretation of such clauses, as he held that they were not binding on the arbitration proceedings due to, as stated and at the risk of repetition, amongst others his decision that 'The legal principle of *stare decisis* is only applicable
E to court proceedings and not arbitration. There is no similar principle of *stare decisis* in arbitration due to the private and confidential nature of its proceedings' and 'Most of the case laws that were produced in this arbitration by both parties are cases initiated in the courts of law and not in arbitration. Therefore, it is not strictly applicable in arbitration'.

F **[16]** With respect, I hold that the arbitrator's decision not to be bound by the doctrine of *stare decisis* goes wholly against the law of the land on this point and I hold that he had committed a denial of natural justice in conflict with Malaysian public policy as he had wrongly disregarded as well as dismissed the doctrine of *stare decisis* when he found himself not to be bound
G by the case laws mentioned and submitted by counsel for DBKL merely because the arbitrator believed that arbitration proceedings are not bound by the doctrine of *stare decisis*. I therefore based in my findings, cannot agree with counsel for STSB who submits the arbitrator is not saying that court cases are not binding on him but other arbitration cases are not binding on him.

H

[17] I refer to and quote the decision of the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, in which Ariffin Zakaria CJ, reading the judgment of the court, said:

> A precedent can be defined as a judicial decision which serves as a rule
I for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues

or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, *ie*, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

…

The common law tradition is built on the doctrine of *stare decisis* which directs a court to look to past decisions for guidance on how to decide a case before it. This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute. The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law. Reliance upon precedent contributes predictability to the law because it provides notice of what a person's rights and obligations are in particular circumstances. It also means that lawyers can give legal advice to clients based on settled rules of law. There is certainty in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law.

This court create precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases.

[18] This principle was adopted by my learned brother, Lim Chong Fong J, (now Judge of the Court of Appeal), in *UDA Land Sdn Bhd v. Puncak Sepakat Sdn Bhd* [2020] CLJU 877; [2020] 1 LNS 877 to apply to arbitration proceedings, of which I respectfully adopt, where His Lordship held:

[33] …The courts are strictly bound by the doctrine of *stare decisis* to faithfully and properly apply the law to the facts in issue. This has been made crystal clear by the Federal Court in the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577 where Steve Shim CJ (Sabah & Sarawak) held as follows:

> Judicial hierarchy must be observed in the interest of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehension in the judicial system.

A Consequently, there is no justification why an arbitrator, being an inferior tribunal, is not similarly bound unless the arbitration is that of the type where the arbitrator acts as amiable compositeur with the express agreement of the parties.

[19] Another decision on a similar point was decided by Mary Lim J B (as she then was) in the earlier case of *Ipoh Tower Sdn Bhd v. Taki Engineering Sdn Bhd & Another Case* [2016] CLJU 874; [2016] 1 LNS 874; [2016] MLJU 1509, where Her Ladyship held:

[81] ... The Arbitrator had further disregarded the doctrine of *stare decisis*. Given that the arbitration is not only conducted in Malaysia, the laws of C Malaysia, especially the law of contract, govern the contract and the arbitration and the Arbitrator was bound to follow the Court of Appeal's decision in *Trikkon Construction*.

[20] I further hold as a result of the same the arbitrator has gone on a frolic of his own when not applying Malaysian case law and only referring to D Malaysian statues and as such the award goes against 'public policy'. An arbitrator is bound to follow the laws of our land, which at the sake of repetition include the application of the doctrine of *stare decisis* and cannot act as autonomous of the courts and a law onto themselves. In the Federal Court case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun* E *& Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413:

[49] The term 'public policy' is not defined in the AA 2005. However, the term appears in three different sections, namely of ss. 4, 37 and 39 of the AA 2005. As commonly used, the term 'public policy' signifies some matter which concerns public good and public interest. It is a fundamental principle of justice in substantive and procedural aspects. F

...

[54] In a recent case of *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 3 MLJ 608; [2018] 3 MLRA 219, the Court of Appeal held, *inter alia*, that a breach of the rules of natural justice that occurred in an arbitral proceedings which has a real and substantial impact on the outcome of G the arbitration and the eventual award rendered, is plainly said to be in conflict with the public policy of Malaysia.

[55] Section 37(2)(b)(ii) of the AA 2005 provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the H making of the award. The circumstances stated in s 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of subpara. (1)(b)(ii)' as appears in s. 37(2) of the AA 2005. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of I setting aside an award under s. 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. The court's

intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.

[21] It is clear that in the context of law here in Malaysia, the 'law' as it stands is defined under art. 160 of the Federal Constitution as follows:

"Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;

[22] Common law in Malaysia would include such Malaysian common law developed through cases decided by our courts. Such a proposition can be found in the decision of the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; [2010] 5 MLJ 145 and the Court of Appeal in *Superintendent Of Lands And Surveys, Kota Samarahan Division & Anor v. Luking Uding & Ors; Th Pelita Sadong Sdn Bhd & Anor (Interveners) And Other Appeals* [2016] 5 CLJ 378; [2016] 2 MLJ 783.

[23] In *Dato Seri Anwar Ibrahim* (*supra*), our apex court held:

[74] The development of r. 137 remains to be seen. The concept of injustice or abuse of processes are jurisprudential concepts that have also devolved from the common law. This relates to art. 160(2) of the Federal Constitution where the word 'law is defined to include written law, the common law in so far as it is in operation in the Federation or any part thereof'. It would beyond the scope of this judgment to explore the detailed definition and scope of the common law and its applicability of r. 137. In a public lecture before the Institution of Engineers Malaysia Kuala Lumpur 31 March 1989 now incorporated in the publication Constitutional Monarchy, Rule of Law and good Governance, HRH Sultan Azlan Shah explained:

> This is how the common law of every country works. Until statutory laws are introduced, in certain areas of the law, a corpus of unwritten laws continue to co-exist. The broad principles of law on a particular aspect of the law, once applied by the Malaysian courts, become part of the common law of Malaysia.
>
> These broad principles are then, by judicial development of the law through adaptation and application, extended to situations to which they had not previously been applied. The process involves the gradual distilling of principles from the facts of concrete cases.
>
> In a strict sense, it is not new law but merely the application of established principles adapting to the changing circumstances in any country.

A Thus is the genius and the strength of the common law – it can adapt to changes to suit the needs without having the constraints which are attached to written laws.

If common law of England is being evolved, there is also expected a consequential development to the Malaysian common law. The reference to *Taylor*'s case and *Pinochet*'s case are lucid illustrations. In *Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia* [1970] 2 MLJ 151, Raja Azlan Shah J (as he then was) observed:

Although decisions of commonwealth courts are not binding they are entitled to the highest respect.

C **[24]** Whilst in *Luking Uding & Ors* (*supra*), our Court of Appeal through their judgment expressed by Abdul Aziz Abdul Rahim JCA, stated as follows:

[47] … We must say that the expression 'having the force of law' in art. 160 of the Federal Constitution must not be read to confine only to D statute law or legislative orders. It must also encompass, in our view, the Malaysian common law developed through the cases decided by our courts especially the appellate and the apex court.

[25] To further supplement the above, this court would like to refer and quote the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] E 3 CLJ 577; [2012] 3 MLJ 149; [2012] MLJU 59, where it was held:

Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also F obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, *ie*, to stand by the decided. In G practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

…

The common law tradition is built on the doctrine of *stare decisis* which H directs a court to look to past decisions for guidance on how to decide a case before it. This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute. The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law. Reliance upon precedent contributes predictability to the law because it I provides notice of what a person's rights and obligations are in particular

circumstances. It also means that lawyers can give legal advice to clients based on settled rules of law. There is certainty in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law.

[26] Thus, to surmise, from all of the above high authorities, it is my view that it is settled law that the word "law" under our jurisdiction must include our common law developed through our courts by cases decided therein which forms part of our common law which must be applied in deciding cases before inferior tribunals which include arbitration proceedings and that the arbitrator herein should have considered and analysed such case laws brought before him before deciding to accept, disregard or dismiss the said case laws.

[27] I must at this stage also consider the findings of the arbitrator at para. 83 of the award where the arbitrator infers that cl. 47 of the conditions of contract was only a contractual clause and unconnected to any public policy requirement by DBKL (para. 83 of award). The salient portion of the said cl. 47 can be found in cl. 47.2 of the conditions of contract, which had stated:

The Contractor shall not sub contract the whole or any substantial part of the Works without the prior written consent of the SO …

[28] In arguing that cl. 47 of the conditions of contract is applicable, DBKL submitted during the proceedings before the tribunal that the element of public policy as stated therein should be considered due to STSB's alleged breach by appointing a third party contractor without DBKL's consent. In this regard, the arbitrator had stated in the award that public policy does not apply to domestic arbitration and that "The only public policy practiced in Malaysia is the NEP Policy".

[29] From the above, I hold that there has been a serious and fundamental error in the arbitrator's said decision on the issue of 'public policy' as it goes against his duties and obligations under the Arbitration Act which provides that the arbitrator must have regard to the public policy of Malaysia as stipulated under ss. 37 and 39 of the Arbitration Act 2005, which states as follows:

Section 37

(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

Section 39

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

(a) where that party provides to the High Court proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[30] In summary, I hold that the arbitrator must consider the issue of public policy in making the award and not simply brush aside the same based on the arbitrator's misconception and flawed idea of what 'public policy' is. I find no justification in such a reasoning of the arbitrator on this issue as it is erroneous in law and I hold that the arbitrator had breached the rules of natural justice in coming to his award on this point.

Denial Of Opportunity To Present Case

[31] Following from all of the above, DBKL also submits that there has been a denial of the opportunity to present its case when the arbitrator had held that he was not bound by the doctrine of *stare decisis* and the arbitrator's findings on what he perceived as 'public policy'. This DBKL submits occurred when the arbitrator had failed to give the parties the right to be heard and/or submit at the said arbitration proceedings on these points.

[32] After due consideration of DBKL's argument above, I find that the arbitrator had deprived the parties the right to be heard on the aforesaid points when he should have done so to allow the parties the opportunity to submit and deal with his understanding of the law and the interpretation that he had afforded to the said issues.

[33] Such findings of the arbitrator only came about and was made known to the parties when the award was published and these points could not have been foreseen by the parties to the proceedings. I hold that this failure to afford the parties the right to submit on these issues goes against the parties right to be heard, which in my view tantamounts to a breach of natural justice and breaches s. 20 of the Arbitration Act 2005, which provides:

> The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

[34] My reasoning on my decision on this point of denial of the opportunity to present its case can be found in the authority of the Court of Appeal case of *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291; [2018] 3 MLJ 608, to which I am bound and adopt, where Mary Lim JCA in delivering the judgment of the court held:

> [58] ... The principal complaint there was that the arbitrators had introduced fresh ideas into their award without giving the parties the opportunity to address them; the fresh ideas involved the formula to be adopted in assessing the stumpage amount. Fisher J summarised at p 463 the principles that should be observed when considering such an application as follows:
>
> (a) arbitrators must observe the requirements of natural justice and treat each party equally;
>
> (b) the detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise;
>
> (c) as a minimum each party must be given a full opportunity to present its case;
>
> (d) in the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument;
>
> (e) in the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond;
>
> (f) the last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing;
>
> (g) on the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight or credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented;

(h) nor is an arbitrator under any general obligation to disclose what he has in mind to decide so that the parties may have further opportunity of criticising his mental processes before he finally commits himself;

(i) it follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result; and

(j) once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

[35] To surmise, it is my understanding that an arbitrator can only resolve the dispute before him in accordance with the applicable law and if I may be permitted to borrow the words of the Singapore Court of Appeal on a similar point, where it was held in *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28; [2007] 3 SLR 86 that:

> [44] There is now an established line of cases that vividly illustrates the principle that arbitrators or judges should not surprise the parties with their own ideas …
>
> …
>
> [46] In *The Vimeira* [1984] 2 Lloyd's Rep 66, the arbitrators were confronted with the question as to whether a particular port where a ship docked to discharge was unsafe for the vessel. The kernel of the dispute, it appeared, was whether there was sufficient water in the port for the ship to dock safely. However, the arbitrators reached the decision that the port was unsafe because the turning area was unduly restrictive for the vessel. The English Court of Appeal set aside the award on the basis that this finding of fact had not been referred back to the parties to address. Ackner LJ chastised the arbitrators and observed (at 76):
>
> > The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.

Excess Of Jurisdiction

[36] I further hold that the aforesaid issues which had been found by the arbitrator has also caused the proceedings in the tribunal to go beyond the terms of the arbitration itself which is often also stated to have been decided on a 'new difference'. In *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; [2015] 6 MLJ 126, this 'new difference' was explained by the Court of Appeal as follows:

> **Finding Of 'New Difference' By The High Court**
>
> The learned High Court judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the arbitrator, as agreed and modified by both parties. Her Ladyship considered the detailed finding of the arbitrator, which was quoted *in extenso*, but concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. This is an area of arbitration law which allows the court to set aside an award on the ground that an arbitrator had decided on a 'new difference' which is irrelevant to the claim, the 'new difference' being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for it and refer their dispute to arbitration, the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties. This rationale is stated succinctly by the Court of Appeal, Singapore in *PT Prima International Development v. Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:
>
> > An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.
>
> These persuasive cases, and others, that have been addressed by our courts lay down one basic principle – an arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute on issues that have not been raised or addressed by the parties …

[37] Thus, premised on the above legal principle, I hold that the ground of setting aside the award of excess of jurisdiction has been proven to my satisfaction as the issue of the non-application of the doctrine of *stare decisis* was never a dispute which was referred to the arbitrator. I have been referred to by counsel for DBKL to the Federal Court case of *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273; [2017] MLJU 1196, to which I accept as the law where our Federal Court held:

[197] In relation to 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitration', *William & Kawharu supra* at 17.5.4 thus commented on the first limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of section 37(1)(a)(iv) and (v) of AA 2005):

> This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue ... If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration.

Decision

[38] In conclusion, this court's conscience has been pricked by the arbitrator's refusal to accept and apply the principle of *stare decisis* well as the decision of not accepting 'public policy' in the arbitrator's decision-making process. I hold that these points would have affected the materiality and impact the outcome of the arbitrator's decision and thus I hold that there has been a breach of public policy and a breach of natural justice in the making of the award whereby this court will now accordingly set aside the award in accordance with ss. 37(1)(a)(iii), 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005.

[39] I therefore grant order in terms of prayers 1 and 2 of encl. 1 in OS 30 but I however make a further order in accordance with prayer 3 of encl. 1 in that the said order is given with liberty to the defendant to commence a further arbitration proceedings against the plaintiff before a different arbitrator in respect of the same dispute.

[40] In the circumstances, encl. 1 of OS 16 is dismissed with costs.